

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

WINES, VINES AND CORKS, LLC,	)	CI 14 _____
	)	
Plaintiff,	)	
	)	
vs.	)	<b>CLASS ACTION COMPLAINT</b>
	)	<b>and</b>
FIRST NATIONAL OF NEBRASKA, INC.,;	)	<b>DEMAND FOR JURY TRIAL</b>
FIRST NATIONAL BANK OF OMAHA;	)	
FIRST NATIONAL MERCHANT SOLUTIONS,	)	
LLC; and FRONTSTREAM PAYMENTS, INC.	)	
	)	
Defendants.	)	

COMES NOW Plaintiff, Wines, Vines and Corks, LLC, by counsel, and for its Class Action Complaint against First National of Nebraska, Inc., First National Bank of Omaha, First National Merchant Solutions, LLC, and Frontstream Payments, Inc., states as follows:

**THE PARTIES**

1. The Plaintiff Wines Vines & Corks, LLC, is a Kentucky limited liability company with a principal office in Fayette County, Kentucky.
2. Defendant First National of Nebraska, Inc. is a bank holding company with a principal office at 1620 Dodge Street, Omaha, Nebraska 68197. Its service of process agent is Maureen O'Connor.
3. Defendant First National Bank of Omaha is a banking subsidiary of Defendant First National of Nebraska, Inc., and has a principal office at 1620 Dodge Street, Omaha, Nebraska 68197. Its service of process agent is Maureen O'Connor.
4. Defendant First National Merchant Solutions, LLC, is believed to be transaction processing subsidiary and/or affiliate of First National Bank of Omaha, with a principal

office at 1620 Dodge Street, Omaha, Nebraska 68197. Its service of process agent is Legal Department, 1620 Dodge Street, Omaha, Nebraska 68197.

5. Defendant Frontstream Payments, Inc. is Delaware credit card processing company with a principal office in the state of Tennessee. Its service of process agent is Tom Head, 100 Winners Cir. N, Suite 158, Brentwood, TN 37027.

#### **JURISDICTION**

6. Jurisdiction and venue are proper in this Court because Defendants First National of Nebraska, Inc., First National Bank of Omaha, and First National Merchant Solutions, LLC, are located within Douglas County, and the parties have entered into a contract that requires that any dispute among them to be brought under the laws of the state of Nebraska in Douglas County, Nebraska.

#### **FACTUAL ALLEGATIONS**

7. Plaintiff operates as a business in Lexington, Kentucky, and as part of its business, sells goods to customers, in part, through credit card transactions.
8. Plaintiff has entered into a written agreement ("the Agreement") with Defendants, whereby Defendants perform credit card processing services for the Plaintiff in exchange for Plaintiff's payment of service fees.
9. Pursuant to the Agreement, Defendants are permitted to charge fees for credit card sales transactions in furtherance of Plaintiff's business operations.
10. Pursuant to the Agreement, Plaintiff was required to establish a designated banking account from which Defendants could withdraw fees owed by Plaintiff under the Agreement.

11. On information and belief, in February and March 2013, a data security breach (“the Breach”) occurred at Defendants’ premises, and credit card processing data was compromised.
12. The Breach was no fault of the Plaintiff’s, but rather, occurred when data kept by Defendants was compromised.
13. On information and belief, during the Breach, Plaintiff’s account information was breached, as was the account information of others who had entered into similar Agreements with the Defendants.
14. As a result of the Breach, multiple unauthorized credit card transactions (the “Unauthorized Transactions”) were processed through Plaintiff’s account in February and March 2013.
15. Defendants charged processing fees to the Plaintiff for the Unauthorized Transactions and took fees directly out of Plaintiff’s designated bank account.
16. Plaintiff bears no responsibility for the fact that the security Breach occurred or for the Unauthorized Transactions.
17. The terms of the Agreement do not allow charging of fees for the Unauthorized Transactions.
18. Plaintiff has asked that the fees for the Unauthorized Transactions be returned to its account, but the funds have not been returned.

#### **CLASS ALLEGATIONS**

19. Pursuant to Nebraska Rev. Stat. § 25-319, Plaintiff brings this action on its own behalf and on behalf and all others similarly situated. This action satisfies the § 25-319 requirements of commonality, numerosity, and superiority.

20. The proposed Class which Plaintiff seeks to represent is defined as follows::

- a) Persons and/or entities which have entered into credit card processing Agreements with the Defendants within the United States of America;
- b) Whose accounts had Unauthorized Transactions processed as a result of the security Breaches from January 1, 2013 through December 31, 2013;
- c) Who have been charged credit card processing fees by Defendants as a result of the unauthorized transactions between January 1, 2013 through December 31, 2013, inclusive.
- d) Excluded from the Class are: i) Defendants and their affiliates, officers, and directors; ii) members of the judiciary and their staff to whom this action is assigned; and iii) Plaintiff's counsel.

21. The members of the Class are believed to be so numerous that joinder of all members is impractical. Plaintiff reasonably believes that hundreds if not thousands of geographically dispersed people and entities have been damaged by Defendants' actions. The names and addresses of the Class members are readily identifiable through records maintained by Defendants, and Class members may be notified of the pendency of this action by mailed, published and/or electronic notice.

22. The questions of fact and law are of a common and general interest to many entities. The claims asserted herein stem from a standard Agreement in place between Defendants and various merchants throughout the United States for credit card processing. The claims involve breaches of the same or similar Agreements and violations of Nebraska's Consumer Protection Act and Uniform Deceptive Trade Practices Act stemming from the same practices of charging credit card processing fees for Unauthorized Transactions.

23. The claims of the Plaintiff are typical of those of the Class. The Plaintiff's claims are based on the same or similar factual and legal theories as those of the class.
24. Plaintiff will fairly and adequately protect the interests of the Class. Plaintiff has no interests adverse to those of the Class it seeks to represent. Plaintiff has retained counsel who are competent and experienced in class action litigation. Plaintiff and its counsel will prosecute this action vigorously.
25. Defendants have acted on grounds generally applicable to the Class thereby making final relief appropriate with respect to the Class as a whole.
26. The questions of law and fact common to the class predominate over any questions affecting only individual members.
27. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy. Joining all Class members is impracticable and prosecuting individual actions is not feasible. The size of the individual claims is likely not large enough to justify filing a separate action for each claim. For many, if not most Class members, a class action is the only procedural mechanism that will afford them an opportunity for legal redress and justice. Even if Class members had the resources to pursue individual litigation, that method would be unduly burdensome to the courts in which such cases would proceed. Individual litigation exacerbates the delay and increases the expense for all parties, as well as the court system. Moreover, individual litigation could result in inconsistent adjudications of common law and fact.
28. In contrast, a class action will minimize case management difficulties and provide multiple benefits to the litigating parties, including efficiency, economy of scale, unitary adjudication with consistent results and equal protection of the rights of Plaintiff and

Class members. These benefits would result from the comprehensive and efficient supervision of the litigation by a single court.

**COUNT I – Breach of Contract**

29. Plaintiff hereby incorporates by reference all preceding paragraphs as if fully set forth herein.

30. Plaintiff and the other Class members entered into a contract with Defendants, whereby Defendants agreed to perform credit card processing in exchange for fees.

31. According to the terms of the Agreement, Plaintiff and the other Class members do not owe fees for credit card processing unless the transactions were submitted by Plaintiff and other Class members in furtherance of their business operations.

32. Defendants have breached their contracts with Plaintiff and the other Class members by charging fees for the Unauthorized Transactions.

33. Plaintiff and the other Class members have suffered actual damages in the amount of the fees charged for the Unauthorized Transactions, as well as consequential and incidental damages.

34. Plaintiff and the other Class members have been and continue to be damaged by the breach of contract.

**COUNT II – Violation of the Nebraska Consumer Protection Act**

35. Plaintiff hereby incorporates by reference all preceding paragraphs as if fully set forth herein.

36. Plaintiff, the other Class members, and all Defendants each qualify as a person engaged in trade or commerce contemplated by the Nebraska Consumer Protection Act, Neb. Rev. Stat. § 59-1601 et seq.

37. The direct withdrawal of fees from the accounts of merchants for Unauthorized Transactions constitutes unfair or deceptive acts or practices in violation of the Nebraska Consumer Protection Act, Neb Rev. Stat. § 59-1602. The refusal to refund the withdrawn fees also constitutes unfair or deceptive acts or practices in violation of the Nebraska Consumer Protection Act.
38. The aforesaid conduct constitutes a violation of the Nebraska Consumer Protection Act, Neb. Rev. Stat. § 59-1603, in that it is a restraint on trade or commerce.
39. These violations have caused financial injury to the Plaintiff and the other Class members.
40. The Defendants' violations of the Consumer Protection Act have an impact of great or general importance on the public.
41. Plaintiff and the other Class members bring this action under Neb. Rev. Stat. § 59-1609 to enjoin further violations, to recover actual damages, and to recover costs of this action, including reasonable attorney's fees.

**COUNT III – Violation of the Uniform Deceptive Trade Practices Act**

42. Plaintiff hereby incorporates by reference all preceding paragraphs as if fully set forth herein.
43. Plaintiff, the other Class members, and all Defendants each qualify as a person under the Uniform Deceptive Trade Practices Act, Neb. Rev. Stat. § 87-301 et seq.
44. The Defendants' representations that its Agreements with Plaintiff and the other Class members would assess fees for credit card transactions processed in furtherance of the Plaintiff's, and the other Class members', business, constitute representations as to

characteristics, uses, or benefits of services that such characteristics, uses, or benefits did not actually have, in violation of Neb Rev. Stat. § 87-302(5), (7), and (9).

45. The direct withdrawal of fees from the accounts of merchants for Unauthorized Transactions constitutes a scheme or device to defraud by obtaining money by knowingly false or fraudulent pretenses, representations, or promises, in violation of the Neb Rev. Stat. § 87-302(15). The refusal to refund the withdrawn fees also constitutes a scheme or device to defraud by obtaining money by knowingly false or fraudulent pretenses, representations, or promises, in violation of the Neb Rev. Stat. § 87-302(15).

46. These violations have caused financial injury to the Plaintiff and the other Class members.

47. Plaintiff and the other Class members bring this action under the Uniform Deceptive Trade Practices Act to enjoin further violations, to recover actual damages, and to recover costs of this action, including reasonable attorney's fees.

#### **COUNT IV - Negligence**

48. Plaintiff hereby incorporates by reference all preceding paragraphs as if fully set forth herein.

49. Defendants had a duty requiring them to use reasonable and industry standard care to secure credit card processing information.

50. Defendants breached their duty of care by failing to adequately secure and protect Plaintiff's and the Class members' account information from theft, collection, and misuse by third parties.

51. Plaintiff and the Class have suffered injuries as a result of the breach, including financial injury.



52. As a direct and proximate result of the Defendants' failure to exercise reasonable care and industry standard measures to protect the account information of the Plaintiff and the Class members, the Plaintiff and the Class member had their account information stolen, causing direct and measureable financial damage, including but not limited to, charges for credit card processing fees for the Unauthorized Transactions.

WHEREFORE, the Plaintiff, individually and on behalf of all others similarly situated, seeks the following relief:

1. Certification that this lawsuit may be prosecuted as a class action pursuant to Nebraska Rev. Stat. § 25-319;
2. Appointment of Plaintiff and Plaintiff's counsel to represent the Class;
3. A declaration that Defendants have breached their contractual obligations to Plaintiff and the other Class members by charging fees for the Unauthorized Transactions;
4. A declaration that Defendants have violated the Nebraska Consumer Protection Act;
5. A declaration that Defendants have violated the Uniform Deceptive Trade Practices Act;
6. Judgment in the amount of Plaintiff's and the other Class members' actual damages, consequential damages, and incidental damages;
7. Judgment in the amount of damages for violations of the Consumer Protection Act;

8. Judgment in the amount of damages for violations of the Uniform Deceptive Trade Practices Act;
9. The Class's reasonable attorneys' fees and costs;
10. Pre-judgment and post-judgment interest;
11. An injunction preventing further violations of the Consumer Protection Act and the Uniform Deceptive Trade Practices Act by Defendants;
12. Trial by jury;
13. Any and all other relief to which Plaintiff and the other Class members appear to be entitled.

**DATED** in Omaha, Douglas County, Nebraska this 31<sup>st</sup> day of January 2014.

/s/ Eric R. Chandler  
ERIC R. CHANDLER  
**Law Offices of Eric R. Chandler, PC, LLO**  
Keeline Building  
319 South 17th Street, Suite 522  
Omaha, Nebraska 68102  
Telephone: 402-933-6858  
Facsimile: 866-929-7939  
eric@ericchandlerlaw.com

and

PHILIP G. FAIRBANKS  
ERIK D. PETERSON  
**Mehr Fairbanks Trial Lawyers, P.L.L.C.**  
201 West Short Street, Suite 800  
Lexington, Kentucky 40507  
Telephone: 859-225-3731  
Facsimile: 859-225-3830  
pgf@austinmehr.com  
edp@austinmehr.com

*Counsel for Plaintiff and  
the Proposed Class*

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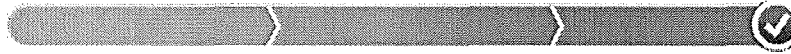
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DATE & TIME	STATUS OF ITEM	LOCATION
February 11, 2014, 5:22 am	Delivered	OMAHA, NE 68103
February 11, 2014, 5:14 am	Arrival at Unit	OMAHA, NE 68108
February 11, 2014, 3:40 am	Processed through USPS Sort Facility	OMAHA, NE 68108
February 11, 2014	Depart USPS Sort Facility	OMAHA, NE 68108
February 10, 2014, 9:53 pm	Processed through USPS Sort Facility	OMAHA, NE 68108

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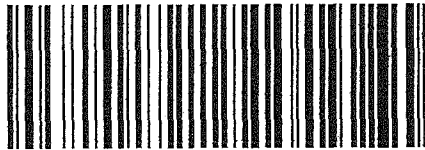


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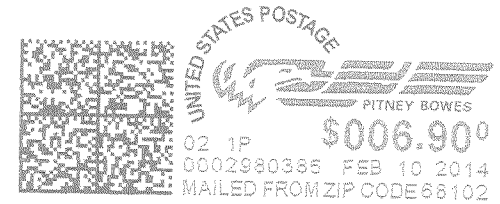


Law Office of Eric R. Chandler  
319 South 17th Street, Suite 522  
Omaha, Nebraska 68102-1911

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First National Merchant Solutions  
c/o Legal Department  
1620 Dodge Street, Stop 3231  
Omaha, Nebraska 68197

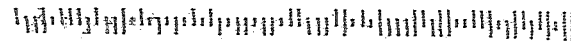


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**SUMMONS**

Doc. No. 241727

IN THE DISTRICT COURT OF Douglas COUNTY, NEBRASKA  
1701 Farnam  
Omaha NE 68183

Wines Vines and Corks LLC v. First National of Nebraska Inc

Case ID: CI 14 785

TO: First National Merchant Solutions

You have been sued by the following plaintiff(s):

Wines Vines and Corks LLC

Plaintiff's Attorney: Eric R Chandler  
Address: Keeline Building  
319 South 17th Street, #522  
Omaha, NE 68102  
Telephone: (402) 933-6858

A copy of the complaint/petition is attached. To defend this lawsuit, an appropriate response must be served on the parties and filed with the office of the clerk of the court within 30 days of service of the complaint/petition. If you fail to respond, the court may enter judgment for the relief demanded in the complaint/petition.

Date: JANUARY 31, 2014

BY THE COURT:

*John M. Friend*  
Clerk



PLAINTIFF'S DIRECTIONS FOR SERVICE OF SUMMONS AND A COPY OF THE COMPLAINT/PETITION ON:

First National Merchant Solutions  
c/o Legal Dept.  
1620 Dodge St. Stop 3231  
Omaha, NE 68197

Method of service: Certified Mail

You are directed to make such service within ten days after the date of issue, and file with the court clerk proof of service within ten days after the signed receipt is received or is available electronically, whichever occurs first.

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DATE & TIME	STATUS OF ITEM	LOCATION
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February 11, 2014 , 5:14 am	Arrival at Unit	OMAHA, NE 68108
February 11, 2014 , 3:40 am	Processed through USPS Sort Facility	OMAHA, NE 68108
February 11, 2014	Depart USPS Sort Facility	OMAHA, NE 68108
February 10, 2014 , 9:53 pm	Processed through USPS Sort Facility	OMAHA, NE 68108

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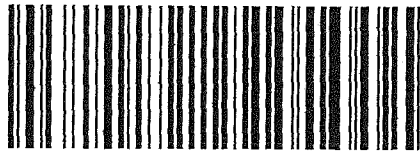


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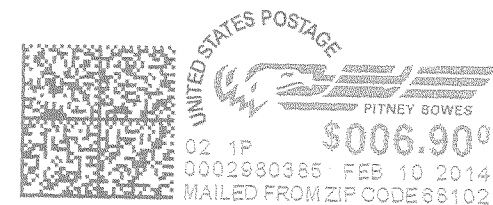


Law Office of Eric R. Chandler  
319 South 17th Street, Suite 522  
Omaha, Nebraska 68102-1911

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First National Bank of Omaha  
c/o Maureen O'Connor, RA  
1620 Dodge Street  
Omaha, Nebraska 68197

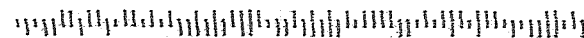


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**SUMMONS**

Doc. No. 241726

IN THE DISTRICT COURT OF Douglas COUNTY, NEBRASKA  
1701 Farnam  
Omaha NE 68183

Wines Vines and Corks LLC v. First National of Nebraska Inc

Case ID: CI 14 785

TO: First National Bank of Omaha

You have been sued by the following plaintiff(s):

Wines Vines and Corks LLC

Plaintiff's Attorney: Eric R Chandler  
Address: Keeline Building  
319 South 17th Street, #522  
Omaha, NE 68102  
Telephone: (402) 933-6858

A copy of the complaint/petition is attached. To defend this lawsuit, an appropriate response must be served on the parties and filed with the office of the clerk of the court within 30 days of service of the complaint/petition. If you fail to respond, the court may enter judgment for the relief demanded in the complaint/petition.

Date: JANUARY 31, 2014

BY THE COURT:

*John M. Friend*  
Clerk



PLAINTIFF'S DIRECTIONS FOR SERVICE OF SUMMONS AND A COPY OF THE COMPLAINT/PETITION ON:

First National Bank of Omaha  
c/o Maureen O'Connor, RA  
1620 Dodge Street  
Omaha, NE 68197

Method of service: Certified Mail

You are directed to make such service within ten days after the date of issue, and file with the court clerk proof of service within ten days after the signed receipt is received or is available electronically, whichever occurs first.



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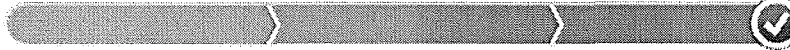
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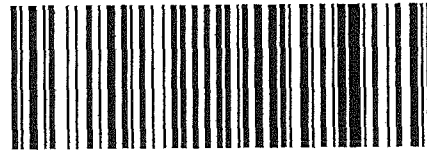


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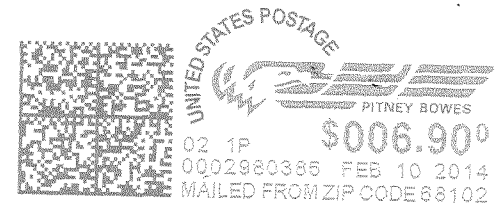


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319 South 17th Street, Suite 522  
Omaha, Nebraska 68102-1911

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First National of Nebraska, Inc.  
c/o Maureen O'Connor, RA  
1620 Dodge Street  
Omaha, Nebraska 68197

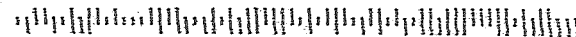


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**SUMMONS**

Doc. No. 241725

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1701 Farnam  
Omaha NE 68183

Wines Vines and Corks LLC v. First National of Nebraska Inc

Case ID: CI 14 785

TO: First National of Nebraska Inc

You have been sued by the following plaintiff(s):

Wines Vines and Corks LLC

Plaintiff's Attorney: Eric R Chandler  
Address: Keeline Building  
319 South 17th Street, #522  
Omaha, NE 68102  
Telephone: (402) 933-6858

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